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LEGAL REGIME OF PROPERTY OF UKRAINIAN LEGAL ENTITIES

Abstract. *This article examines existing legal regime of property of legal entities under Ukrainian legislation. Various titles to property are analysed by the author: ownership, right of economic and operational management, right to use and other real rights and rights of obligation (rights in personam). Most of existing titles are controversial both from theoretical and practical standpoint. From theoretical standpoint, it is rather hard to distinguish them one from another and to point out their peculiarities. This is especially true about rights of economic and operational management which were designed in Soviet period for the purposes of Soviet economy, but somehow remained in modern Ukrainian legislation. As existing case law shows, this leads to numerous legal disputes in practice which reveal, in particular, the problems of liability of a legal entity and its property independence. The most notorious among these disputes are analysed in the paper, e.g. the dispute between Ukrainian state and Ukrainian trade unions on property transferred to them by the former USSR, the dispute between certain Ukrainian companies and Russian Federation on property expropriated in Crimea. Based on the analysis the author suggests certain ways of solution of existing problems. First, the author insists on recognizing legal entities as property owners. Second, the author proves that public companies need more detailed regulation and are to be provided a clear legal status. It is preferable to stipulate these issues in the Civil Code of Ukraine thus providing comprehensive regulation on all types of legal entities.*

Key words: legal entities, property, ownership right, other real right, right of economic management, public companies, liability, seizure.

Introduction

The legal bases for legal entity property ownership are essential both theoretically and practically, because they determine the possibilities the legal entity has in relation to its property.

These are important for economic transactions and for identifying the liability to creditors.

The difficulty is that in Ukraine legal entities may be owners and non-owners. Their property rights were stipulated in

the Soviet law and they have survived till today, despite considerable reforms of the civil law. These are the rights of economic and operational management. The controversial nature of these property rights is especially visible in private enterprises that are not referred by law to business companies, but judicial precedents have recognized them as such.

There are a number of problems regulating the rights of a legal entity (usually a corporation) to the property, transferred by a member of the entity as a contribution to the share capital, though not to ownership but to possession (use). Therewith, it is hard to identify the value of the contribution and, respectively, member's share in the corporate share capital. It is also unclear, whether the state registration of the legal entity's rights to this property is required, provided it is real estate.

A separate group of problems is determined by the fact that in the Soviet times property was frequently transferred by the state to non-state-owned legal entities (for example, Trade Unions) without specifying their legal title. At that time it was generally accepted to be limited to the term "property transfer", due to which in the modern legal situation there arise legal disputes regarding the rights to this property.

It is also important to identify public corporations' property legal regime, which would facilitate the solution of the issue whether the state may be held liable for corporate debts as a founder.

1. Models of legal entities' property rights in Ukraine

1.1. General remarks

One of the prerequisites for the participation of legal entities in property

relations is the very existence of their property. For that matter, it is important to determine the legal bases for their property possession.

As a rule, it is the *ownership right*: when establishing a legal entity, founders normally transfer their property to the legal entity under the ownership right, and during its activity after the registration the legal entity purchases property on the contractual basis or creates it (e.g. it manufactures products).

Ukrainian legislation also provides that the founder or founders may transfer their property to the legal entity for *use* only. In this case, it is important to identify its legal title of using the property, which is related with serious difficulties. Firstly, it may not be analogous to contractual use of the property (rent or use without any consideration), since the relations between the founders and the legal entity are fundamentally different from contract ones – these are corporate relations. Secondly, if a legal entity has a sole founder who transferred his/her property to the legal entity's use, there emerges an issue of whether the property, purchased by the entity on other grounds, may be considered the entity's ownership. Thirdly, Ukrainian laws still include some atavisms of the Soviet law represented by economic and operational management – these were the rights under which property belonged to state-owned enterprises¹ in the USSR. Despite

¹ The term 'state-owned enterprise' is unknown to the European legislation. However, it is familiar for Soviet legislation and legislation of some post-soviet countries, particularly, for Ukrainian legislation. This term identifies commercial legal entities founded by the state.

the reforms, these rights have been preserved, and they may apply not only to state-owned enterprises and foundations¹, but also to private companies.

Thus, in Ukraine there are legal entity that are owners and non-owners, which entails certain specifics in the civil transactions with their property and the property liability of their members.

1.2. Property ownership rights of legal entities

The ownership right provides the owner with maximum opportunities to dispose their property and effect various transactions and other legal acts (para. 1 of Art. 316 and paras. 1 and 2 of Art. 319 of the Civil Code of Ukraine). Hence, it is primarily important to identify the person who determines the legal entity's will and, thus, whether there are any restrictions for those legal entities that are owners of the property contributed to their capital in terms of the rights to their property.

If the legal entity is the owner of its property, its will is formed and expressed in a specific way depending on the type of the legal entity. Provided it is a corporation, then, consequently, its will is formed and expressed depending on the model of corporate governance. It is exactly for the sake of formation of the corporation's will that its shareholders seek to concentrate in their hands the respective stock of shares, which enables them, directly or indirectly, to influence profit distribution, the corporation's property formation and disposal. There-

fore, it is more important to know who the beneficiary is rather than whether the legal entity is the owner.

However, the concept of the beneficiary is not defined in detail in the Ukrainian company law (in the respective Civil Code articles, Law on Joint-Stock Companies and on Limited and Additional Liability Companies), but is given in the Law On preventing and counteracting to legalization (laundering) of the proceeds of crime, terrorist financing, and financing proliferation of weapons of mass destruction. It is the definition from this Law that is used in other laws, e.g. On State Registration of Legal Entities, Individual Entrepreneurs and Public Organizations etc. It was suggested that the data on beneficiaries should be published on the Unified State portal of public data, which was announced by the Prime Minister and the Minister of Justice of Ukraine in 2017². However, this portal does not currently include these data.

The aforesaid shows that in Ukraine the issue of the beneficiary is more relevant for criminal than for civil law, which does not contain regulations of the correlation of the owner and beneficiary powers.

Restrictions of rights of legal entities that are owners of the contributed property to the free disposal of their property may be represented by the prohibition for some types of legal entities to distribute commercial proceeds among their members (shareholders). This mainly

¹ The term 'state-owned' foundation' also is frequently used in some post-soviet countries, particularly, in Ukraine, and identifies foundations created by the state.

² According to the Prime Minister's announcement, the data was to be disclosed and placed on the web-site <https://data.gov.ua>

applies to non-for-profit organizations (according to the Ukrainian law, non-entrepreneurial corporations¹). However, the prohibition also refers to some entrepreneurial corporations. For example, in case a stock exchange is established as a joint-stock company (hereinafter – JSC), its shareholders are not paid dividends (part 1 Art.21 of the Law on Securities and Stock Market), though the very legal nature of JSC implies the distribution of profits as dividends paid to the shareholders.

1.3. Other property rights of legal entities

There are several models of a legal entity's rights to the property that it does not own².

1.3.1. Sometimes this right is considered a *right of claim* (a right of obligation, *in personam* right), since under Ukrainian legislation the property may be transferred by a member to the legal entity to use, and, hence it is to be subsequently returned to the member. In this case, the challenge is to determine the value of the contribution and, accordingly, the value of the shareholder's share in the share capital. Since a share-

holder's contribution is not the property but the right to use it, then it is to be evaluated. Nonetheless, the Ukrainian law does not provide any outline thereto. In practice, the evaluation of this contribution involves the value of the property transferred by the shareholder to the corporate use to determine the remuneration for the use thereof, the period of use and the other parameters.

Since the use of the shareholder's property will not be remunerated to the shareholder, it will be regarded as this shareholder's contribution and will accordingly determine the shareholder's share in the share capital.

In these cases, the legal regime of this property is rather ambiguous: it is transferred to the corporation for gratuitous use, although the amount of money which is not received by the shareholder from the corporation for such use forms another kind of the shareholder's property – his or her share in the share capital. Hence, this shareholder both retains the ownership of the property transferred to the company and acquires share in the share capital, which provides this person with the right to claim for returning this property within the time and on the terms stipulated by the respective property transfer agreement. Apart from that, this property cannot be seized for the corporate debts as it is not in its ownership, but is its shareholder's ownership.

1.3.2. In Ukraine there are also legal entities – non-owners that have *real rights* (rights *in rem*) to their property either transferred to them by the founders, when establishing these legal entities, or purchased by the entities on dif-

¹ According to the Civil Code of Ukraine (article 83, para2) all the corporations are divided into entrepreneurial and non-entrepreneurial ones. These terms are analogous to 'commercial' and 'non-commercial' corporations, or 'for-profit' and 'non-for-profit' corporations which are common for European law.

² In this article legal entities which do not have ownership rights to the property contributed by their founders (shareholders) are called 'non-owners'. These legal entities may hold property transferred to them by their founders (shareholders) on various grounds, except for ownership right.

ferent grounds in the course of their operations. The owner of the property is the legal entity's founder. This model was typical for public (state-owned) enterprises and foundations under the Soviet law. It was based on the concept of a single and indivisible right of state ownership (Venediktov, 1948), which did not allow for its fragmentation among state-owned enterprises and foundations which were entitled to *operational management* (Tolstoy, 1986). That was also impossible due to the Soviet law rejection of split ownership and unacceptability of trust ownership.

Despite the fundamental change in the economic relations in the country that gained independence in 1991 and the corresponding legislative reforms, instead of renouncing the "dioecious" state ownership, this model evolved even further. There emerged another clone of the ownership right— the *right of economic management*. Nowadays it is regarded as a basis on which property is assigned to state-owned enterprises (Kryazhevskikh, 2004), while the operational management right is assigned to state foundations only.

Though it may seem strange, the generation of non-owner companies in Ukraine did not terminate there. The matrix of Soviet law continued sculpting them. With the adoption of the Commercial Code of Ukraine in 2003, the legal community faced a very wide variety of types of legal entities and their rights to property. This Code provided for the existence of private non-owner companies possessing property under the right of economic management or op-

erational management, e.g. legal entities, founded by public organizations and consumer cooperatives. A rather complicated situation is with the property rights of the so-called private enterprises¹, which will be discussed below.

All these testify to the fact that there has been a rather controversial situation regarding regulation of legal entities' rights to property in the Ukrainian law (Spasibo-Fateeva, 2007 and 2014). Preserving the rights developed by the Soviet science and adapted only to the economic and legal realia of the complete dominance of state property, the Ukrainian law-makers further expanded the horizons of quasi-ownership rights (operational and economic management). Therewith, there have been no attempts taken to perform fundamental reforms of the property rights of legal entities. In addition, the law-makers did not use the trust as a special type of ownership introduced in the Civil Code of Ukraine (part 2 Art. 316), which could in fact replace retro-Soviet law, though it was criticized by academics and practitioners (Maidanyk, 2014). Thus, the trust property did not supplant the Soviet models of real rights, but actually remained non-demanded in the Ukrainian realities in respect of the legal entity property right.

1.3.3. A possible variation is the complex model of a legal entity's property rights where it is the owner of a part of

¹ Private enterprise is a special form of corporation provided for by the Commercial Code of Ukraine, which resembles limited liability company in many respects. The essence of this form will be further described in more detailed way.

the property and not the owner of the other part of it. This applies to gas supply and gasification companies (Naftogaz, in particular), which, being owners of some of their property, hold some state property under the right of economic management, which is the property constituting the Unified Gas Transportation System of Ukraine ('On Principles of Natural Gas Market Functioning', 2010; Decree of the Cabinet of Ministers of Ukraine No. 770 of 20 August 2012).

A model represented by the mixture of both real rights (*in rem*) and obligation rights (*in personam*) is also possible. For example, in case of leasing a state-owned uniform property complex (UPC), the leasing company, not being its owner, gains all the income from its operations (Art. 23 of the Law of Ukraine On Leasing State and Municipal Property) and is also the owner of all other property besides the one it leased.

1.3.4. Finally, it is also important to note that there are cases where the rights under which a legal entity possesses its property are *uncertain and vague*. This uncertainty arose due to the use in the Soviet legislation of the term *transfer* of state property to non-state legal entities without determining legal implications for such transfer, i.e. the right under which they own the property in question. At times the law indicated that the state property is transferred to management, and sometimes that it is transferred to *gratuitous exclusive possession* (Resolution No. 66 of 12.12.1921; Resolution On Labour centres 05.04.1922)

A fine example of the above mentioned is the transfer of property by the

state to trade union organizations as far back as the early 20th century, by which the state transferred numerous properties (premises, holiday houses and other facilities). Neither the 1922, nor 1964 Civil Code of the Ukrainian SSR provided for the clear legal mechanism of the state alienation of its property to non-state organizations¹ (collective farms, cooperatives and NGOs). This approach of the Ukrainian legislator of the time revealed its intention to avoid turnover of real estate.

For quite a long time the state did not manifest itself as the owner of the property previously transferred to the trade unions, but in 1992 and 1994 two resolutions ("On Property Complexes and Financial Resources of Public Organizations of the Former USSR Located in Ukraine" and "On Property of All-Union Public Organizations of the Former USSR"), and in 2007, the Law On Moratorium on Alienation of Property Owned by the Trade Union Federation of Ukraine were adopted by the Verkhovna Rada of Ukraine. These legal acts were aimed at reserving the state ownership of the property transferred by the state to the trade unions more than 70 years before: first, by temporarily recognizing the state ownership rights and subsequently by finally vesting the Ukrainian state with the free disposal right, including privatization.

¹ In Soviet law all the legal entities which were not created by the state were called 'non-state organizations'. They were represented by some types of non-commercial corporations only, as trade unions and non-governmental organizations.

That entailed numerous legal disputes, including those relating to the property that had already been alienated by the unions – contributed to the share capital of private companies established by trade unions and further sold by these companies to third parties. The state claimed for returning its property from the illegal possession by third persons. Therewith, case law showed different approaches to resolving these disputes. From the late 1990s till the mid-2000s the state vindictory actions were dismissed. However, since 2007, these suits have been satisfied by courts on the grounds that the state did not transfer its property to trade unions granting them ownership right in such property¹. Nevertheless, courts did not answer the question under which right trade unions possessed and used the property transferred to them by the state for such a long time. It appeared that being owners of some property, trade unions also had had other property on other grounds (suppose, real rights, similar to operational man-

agement of state-owned enterprises) and that was obviously nonsense (Spasibo-Fateeva, 2007, 2019)

This is not the only example that demonstrates the challenges arising from the use of the term “transfer of property” without indicating under what right it is transferred. A similar situation was observed with the social, cultural, and welfare facilities (premises used by state-owned enterprises as canteens, clubs, kindergartens, children’s recreation camps etc.), which were “*transferred*” gratuitously during privatization provided that the rest of the state property was privatized by the workers (para. 2 of Art. 24 of the 1992 Law of Ukraine On Privatization of Property of State Enterprises). However, after some time (already in 1997 and 1999) the state passed regulations aimed at securing the ownership of this property (Resolution of 15 July 1997 No. 757; Order of 19 May 1999 No. 908/68).

2. Certain issues of regulation of legal entities’ property rights under Ukrainian law

While for the Civil Code of Ukraine it is essential for all legal entities to be owners, the opposite approach is observed in the Commercial Code of Ukraine where Art. 133 provides for three types of legal entities’ property rights: 1) ownership; 2) other real rights provided for by the Commercial Code of Ukraine (these include economic management and operational management) and the Civil Code of Ukraine (the right of possession and use, which should be understood as servitude, emphyteusis, and superficies); 3) other rights under the

¹ See, for example: Resolution of the Supreme Court of Ukraine dated 22.11.2007 in case 3-416k07, retrieved from: <http://reyestr.court.gov.ua/Review/1291052>; Resolution of the Supreme Court dated 13.03.2018 in case 5002–22/3237–2011, retrieved from: <http://reyestr.court.gov.ua/Review/72863325>; Resolution of the Supreme Court dated 10.05.2018 in case 17/5007/98/11, retrieved from: <http://reyestr.court.gov.ua/Review/74025136>; Resolution of the Supreme Court of Ukraine dated 04.11.2014 in case № 3-166rc14, retrieved from: <http://reyestr.court.gov.ua/Review/41479727>; Resolution of the Supreme Economic Court of Ukraine dated 26.11.2014 in case 47/296, retrieved from: <http://reyestr.court.gov.ua/Review/41578545>

contract with the property owner. Thus, according to the Commercial Code of Ukraine legal entities may not be considered owners of their property which will be owned by them under rights of obligation (contractual rights) or real rights different from the ownership right.

Although the current legislation attempts to make a certain distinction between the above two types of property rights under which legal entities may possess their property without having ownership right to it (i.e. real rights and rights of claim), in some cases these types mixed with each other. That was the way in which *hybrid* rights having both real and obligation (contractual) nature appeared. Despite the fact that economic management is positioned as a real right (in rem) (Sherbyna, 2018), in practice, economic management contracts came into use, and in 2013, even a standard economic management contract for the parts of the unified gas transmission system of Ukraine (between the owners and gas transmission or gas distribution entities) was developed. It was approved by the Resolution of the National Energy and Utilities Regulatory Commission (NEURC) No. 226 of 7 March 2013, and registered in the Ministry of Justice of Ukraine on 27 March 2013 under No. 494/23026.

It should be noted that this symbiosis of real and obligation rights is fundamentally different from the regulation of such real rights as servitude, emphyteusis, and superficies (Articles 402, 407 and 413 of the Civil Code of Ukraine), which may also stem from a contract. Apparently, legal entities' rights to the property they

do not own, but which is in their economic or operational management, significantly depend on the property owner.

2.1. The aspects which demonstrate full dependence of holders of economic and operational management rights on the owner of the property.

i) If there is an economic management contract, then it must be properly executed by the legal entity being the holder of the right of economic management in the first place. Therefore, the owner of the property is entitled to observe the compliance of such legal entity's actions with the contract, and consequently – the exercise of property rights by the entity. Moreover, this observation is continuous.

ii) The property owner establishes the scope of the user's (the legal entity's) rights, and not only in the law and by-laws, but also in its charter.

iii) The owner exercises its powers in respect of the property transferred to the legal entity by managing the entity through the appointment of its manager and entering into a contract with him (her).

Therefore, through these legal mechanisms, the owner retains full control over its property during the entire period of such property being in the legal entity's possession. All of this is not possible in the case of other real rights in the property (rights in the property of others, *jura in re aliena*) as provided for by the Civil Code of Ukraine (right of possession, servitude, emphyteusis, superficies),¹ where

¹ The Civil Code of Ukraine provides for four types of real rights in the property of others: the right of possession, servitude, emphyteusis,

the total control over the person to whom the property was transferred by the owner for use is excluded.

2.2. In addition to the above, it is reasonable to note other differences between the real rights (particularly, real rights in the property of others, or *jura in re aliena*) regulated by the Civil Code and the Commercial Code of Ukraine which are determined by the nature of these rights.

i) One can agree with the *absoluteness* of the rights of economic and operational management. However, the absoluteness extends only to relations between the holders of these rights and all the other persons, but doesn't extend to the relations between the entity and the property owner that transferred that property to it. The civil relations between the property owner and the holders of economic management and operational management rights are relative.

Different are the real rights in the property of others provided for by the Civil Code of Ukraine (servitude, emphyteusis and superficies). Their absolute nature has no exceptions. The holder of these rights is opposed by an unlimited number of obliged persons who only have to refrain from actions that impede the exercise of these rights. That is, their obligation, including that of the property owner, is passive in nature. This is not thwarted by the fact that certain real rights in the property of others are established by contract.

superficies. Although the right of possession is frequently determined as a separated real right in the European legislation, the Ukrainian legislation recognizes it as the one.

ii) *Independence* from the right of ownership is seen in the fact that the real rights in the property of others are exercised independently, irrespective of the exercise by the owner of its right. That is, the owner possesses uses and disposes of its property at their own discretion, taking into account, however, the existence of certain burdens that limit their capabilities, which are the rights in the property of others.

The holders of the rights in the property of others (servitude, emphyteusis and superficies) also exercise their rights at their discretion. However, the scope of their powers is narrower than that of the owner whose right to the property is burdened with their rights.

The holders of the rights of economic management or operational management are far from being always able to exercise their rights independently. On the contrary, they often require the consent of the owner or have to comply with the respective legal mechanisms established by the owner.

iii) The *resale right* is an inherent characteristic of real rights and one of the manifestations of their absolute nature, which fundamentally distinguishes them from the rights of obligation (contractual rights). The essence of it lies in the fact that the transfer of ownership of the property to another person does not lead to the termination of the *jura in re aliena* in this property.

This is not typical for the rights of economic and operational management which are not transferred to other persons in the event of a change of the owner.

As a rule, in case of privatization of the property assigned to a state enterprise, the state ceases to be the owner of such property, but at the same time, the right of economic management terminates. It is transformed into the private property right. Consequently, in such a scheme of change of ownership, two real rights are subject to termination at a time – the state’s ownership right and the right of economic management. By the way, it is not perfectly clear in this case which right is succeeded to by the private owner who privatized the state property.

iv) The *transferability* of the rights in the property of others characterizes them as objects that can be alienated. This applies to emphyteusis (para. 2 of Art. 407 of the Civil Code of Ukraine, except for the cases contemplated by para. 3 of that Article) and superficies (Art. 413 of the Civil Code of Ukraine). However, the Civil Code of Ukraine does not provide for transferability of the right of possession and the servitude is not subject to alienation (para. 4 of Art. 403 of the Civil Code of Ukraine). That means that two out of four rights in the property of others stipulated in the Civil Code of Ukraine are *non-transferable*.

The rights of economic and operational management are also non-transferable. These rights may not be sold, whereas alienation is allowed for the property being in economic or operational management. Here is a definite similarity of these rights and the ownership, where the right cannot be alienated itself.

v) It is important to also compare *in whose interest* real rights are established.

Whereas the rights in the property of others are established for the benefit of the person who becomes their holder, the rights of economic and operational management are established for the benefit of the property owner. The state assigns property to state-owned entities to make profits from their operations.

It is important to mention the difference in the way the issues related to competing interests of the owner and the holder of the rights in the property of others are addressed. Therewith, while the emphyteuta and the superficiesary have priority compared to owner, the economic management or operational management rights holders, vice versa, cede to the owner.

The aforesaid testifies to the fundamental differences between the rights of the property of others and those of economic and operational management, as well as to rather controversial legal regulation of the property rights of non-owner legal entities, which does not always agree with the regulation of real rights (ownership rights and rights in the property of others).

3. Problems of the legal regime of property of particular types of legal entities under Ukrainian laws

3.1. The legal regime of private enterprises’ property

The Civil and the Commercial Codes of Ukraine contain numerous controversies as to the regulation of the types and forms of legal entities and their property rights (*Civil and Commercial Codes*, 2014). The Civil Code of Ukraine provides for two incorporation forms of private legal entities only – corporations

and foundations whereas the Commercial Code provides for more variety making it impossible to understand in which way they differ from the corporations (first of all, business corporations¹). This may be clearly illustrated by the example of the so-called *private enterprises* (hereinafter – PE). Neither theorists nor practitioners have been able to explain the differences between these companies and limited liability companies (Spasibo-Fateeva *et al.*, 2007).

According to Art. 113 of the Commercial Code of Ukraine, a PE “*operates under the private property rights*” of one or more persons (apparently, founders), which makes it impossible to identify the legal grounds on which the property is transferred to this legal entity. Therefore, it is impossible to determine whether the PE itself is the owner or not. Thus, some PE articles of association stipulate that they are owners, while others, vice versa, that they are not owners of the property transferred to them by their founders. This paradoxical situation reflected on the PE founders, too.

If a PE is the owner of the property, the founder may not be the owner, because property may not be owned by two persons simultaneously. Founder’s rights are similar to corporate ones while the legal position of the PE’s founder is vir-

tually the same as that of a business corporation member. However, since the PEs are regulated separately from business corporations in the Commercial Codes of Ukraine (PEs – in part 11, whereas business corporations – in part 9, where Art. 80 does not include PEs as business corporations), they were considered a special form of legal entities, different from business corporations for a long time. Therefore, PE founders’ rights were not identified as corporate ones, which were deemed inherent in the shareholders of business corporations only.

All that brought out significant problems in the resolving of disputes between a PE and its founder, as under the procedural legislation of Ukraine corporate disputes (disputes between a business corporation and its shareholder) were within the jurisdiction of commercial courts (p. 4 para. 1 Art. 12 of the Commercial-procedural Code valid till 2013 – The Law of 10.10.2013 No. 642-VII amended this Article respectively), whereas disputes between other legal entities and their members (founders) were within the jurisdiction of general courts. One of the reasons was the uncertainty in the PE founders’ rights and the formal lack of the ground to consider them corporate. Secondly, it also appeared problematic to establish the object of PE founder’s rights, since this issue was inevitable provided the founder of the PE died and his/her heirs needed to understand what they could inherit (Spasibo-Fateeva, 2014), as well as in case of dividing the property between spouses, one of whom is a PE’s founder

¹ According to the Civil Code of Ukraine (article 84) all the entrepreneurial corporations are divided into two types: manufacturing cooperatives (vyrobnychii kooperativ) and business corporations (hospodarski tovarystva), represented by limited and additional liability companies, joint stock companies, full and limited partnerships. Thus, business corporations are a kind of commercial corporations.

(Spasibo-Fateeva, 2012). In addition, it was the case if the founder intended to sell his or her questionable property.

Currently, this problem cannot be solved based on any specific legal ruling. Therefore, the practice (generally notarial practice when documenting agreements and notarizing them) followed the way of identifying the PE founder's rights with those to the share in the share capital of business corporations (corporate rights). A similar approach has been observed since 2012 in precedents – courts commenced equaling PEs to business corporations, while disputes between founders and the PE have been referred to as corporate. That was directly confirmed by the Plenum of the Supreme Economic Court of Ukraine in its Resolution No 4 of 25.03.2016 'On Certain Practical Issues, Arising from Corporate Disputes'. It is evident that the Ukrainian law-maker reacted to the case law and altered the Commercial-procedural Code, where Art. 20 explicitly provided for these disputes to be referred to as commercial courts' jurisdiction. Nevertheless, no alterations were made in the Commercial Code of Ukraine, which entailed an atypical situation for the legislation, when the problem was solved in the procedural, but not in substantive law. It has remained nearly unchanged in terms of PE regulation since 1991¹. For over 20 years all persons who encountered issues with the PE, including

their founders, experienced significant difficulties in legal relations with them.

It is also very complicated if the PE is not the owner. Then, following the logic, the owner of its property is the founder, and if there are several founders, they are co-owners. In this model, the legal status of the PE's property is identical to that of the state enterprises that is owned by the state and economically managed by enterprises. However, the meaning of this legal status is unclear since it is not based on the concept similar to the one developed in the Soviet times for the state property.

However, if the PE's founder is the owner, in the event of his/her death, it is clear what will be inherited – it is the property being in possession of a PE. Moreover, in case of dividing the property of the spouses, if one or both of them are a PE's founders, they may divide the PE's property, because it is owned by them.

Nonetheless, it should be mentioned that in practice the legal status of the PE's property and the rights of spouses to the property have long been destabilizing the positions of the supreme judicial authorities of Ukraine. Thus, in 2007, the position of the Supreme Court of Ukraine was as follows: the property of the PE is not a part of the joint property of the spouses. The second spouse is only entitled to a share in the profit received from the activities of the PE (Resolution of the Plenum of the Supreme Court of Ukraine No. 11 of 21/12/2007, para 29).

However, in 2012, the Constitutional Court of Ukraine took the opposite position by ruling that the property of the PE

¹ PEs as a form of legal entity was initially introduced by the The Law on Enterprises in Ukraine adopted in 1991. It then was repealed, but the provisions about PEs moved to the Commercial Code of Ukraine.

is subject to the joint property of the spouses (Decision of the Constitutional Court of Ukraine No. 17-rp/2012 of 19/09/2012, 2012).

Accordingly, the Supreme Court of Ukraine also changed its approach and in 2013 it ruled that even if the spouses contribute their joint property to the capital of the PE founded by one of them, the ownership of that property is transferred to the PE, and the ownership right of the other spouse (i.e., a real right) is transformed into a claim right (a right of obligation), the essence of which is the right to claim payment of half the value of the contributed property in the event of division of the joint property (and not the ownership of the property itself), or the right to claim a half of the profit received from the activities of the enterprise, or half of the property that remains after the liquidation of the PE (Resolution of the Supreme Court of Ukraine dated 02.10.2013 in case 6079/13).

The cases related to succession of a PE's property are resolved in the same way. Therefore, if the PE's property was formed upon the PE's founding out of the contributions of one of the spouses, then the other spouse may demand recognition of his/her right to a half of the property rights of the deceased spouse (rights in the PE's property). However, the other half will be inherited as per the standard procedure.

The confusion as to the legal regime of the property of PEs and similar companies of uncertain legal status was done away with after the adoption by the Supreme Economic Court of Ukraine (2016) of the legal position according to

which by their essence and legal nature these companies are business corporations (Resolution of Plenum of the Supreme Economic Court of Ukraine No 4 of 25.03.2016, 2016). In concluding so, the Court relied on the approach expressed by the Constitutional Court of Ukraine, which established the criterion for classifying legal entities as business corporations – the existence of a share capital.

Thus, undoubtedly, the PE was a legal error, which the courts attempted to remove, and they managed to do that. In any case for the case law based on the procedural law and on the legal positions of the supreme judicial authorities the issue of property and corporate rights of the PE's founders has already been settled. Still, it has not been solved generally in terms of establishing these legal entities and entering into contracts with their property and the property of their founders as long as the provisions of the Commercial Code has not been altered with regard to PEs. It appears that the best option to solve these problems is the cancelation of Art. 113 of the Commercial Code. Even this would merely confirm what was already adopted in the procedural legislation – equaling PEs and business corporations.

3.2 Legal regime of the consumer cooperatives' property and legal entities established by them

The legal status of these cooperatives is regulated by the Civil and Commercial Code of Ukraine as well as the Laws On Cooperation and On Consumer Cooperation, whose provisions contradict each other. For example, according to

para. 1 Art. 9 of the Law On Consumer Cooperation consumer cooperatives, their associations, and the legal entities established by them are owners. However, the Commercial Code of Ukraine (para. 5 of Art. 111) does not recognize them as owners.

There is a certain contradiction in the definition of the holders of the consumer cooperatives' ownership rights. Para. 6 of Art. 9 of the Law provides that these include *members* of a consumer cooperative, *personnel* of cooperative enterprises and organizations (that is legal entities established by a consumer cooperative), as well as *legal entities* whose "share in the share capital is determined by the relevant charters". Without focusing on the obvious flaws in the wording of this article, we note the fact that the members of a consumer cooperative are named as the holders of the ownership rights in the property. Consequently, the consumer cooperative itself cannot be the owner, because otherwise there would be two owners of the same object – the property of the cooperative.

However, if we consider the members of a legal entity to be the owners in the entity's property, then it follows that this property will belong to them on the basis of joint ownership. Then it is not clear what the company itself will be to its property (Kucherenko, 2005). However, it is uncommon for the members to be recognized in the charters of consumer cooperatives as co-owners of the cooperative's property.

It should be noted that the situation was the same for the rights in the property of peasant farms (farming enter-

prises). To date, it has been rectified, and such farms are now recognized as the owners of their property. For unknown reasons, no changes have been made in the legislation on consumer cooperation yet.

As for the rights to the property of the companies created by a consumer cooperative, due to the contradictions in the legislation of Ukraine, a very strange situation has arisen where such companies registered in the Western part of Ukraine are, as a rule, owners of their property, and those registered in the Eastern part of Ukraine are non-owners. In most cases, these companies possess their property under the right of economic management, and in Dnipro Region – the right of operational management.

It is obvious that these ambiguities in legislation must be removed and the regulation of the rights in the property of the cooperatives, including consumer ones, as well as legal entities established by them, must be unified – all of them must be recognized as owners of their property. It is also unnecessary to regulate cooperatives in numerous laws. It is sufficient to have one law on cooperation.

4. Effects of the members' obligations on legal entity's property

4.1. Legal entities' property as the object of seizure for the obligations of their members (founders), and regulations on financial liability

4.1.1. As regards the seizure of a person's property, it is the consequence of certain obligations which have not been fulfilled. These may be obligations of

either legal entities or of their founders (members or shareholders) which involve their liability.

One of the features of a legal entity is its independent liability. It means that neither its members (founders or shareholders) are liable for its debts, nor the legal entity is liable for the debts of its members. This is provided for in Articles 80 and 96 of the Civil Code of Ukraine. However, there may be exceptions. For example, the law provides for the liability of members of full and limited partnerships, additional liability companies and the liability of the state or local communities for the obligations of the state-owned and municipal¹ enterprises and foundations.

The members (founders or shareholders) of legal entities may also be held liable under court decisions. An example of this is the application by the courts of the “corporate veil piercing” doctrine, which proves the unlawful/unscrupulous actions of the persons who form or influence the decisions of a legal entity’s body, as a rule, a joint-stock company, that caused damage. Nonetheless, this issue goes beyond the subject of this paper.

The problem of the liability of legal entities and their members is multi-faceted and is to be considered within a separate article. Therefore, we will touch upon the issues of admissibility of seizure of the property of legal entities of

different legal status for the debts of their members, since the response to it depends on the legal status of the property.

So, our first point will concern the independent liability of a legal entity regardless of its rights in property and taking into account only the diversity of the types of legal entities, some of which involve liability of their members for their obligations. This is a provision of the doctrine of legal entities.

When it comes to the seizure of the legal entity’s property:

(i) this may or may not be related to the actions of its members;

(ii) these actions may constitute a violation of law, or may be viewed in the context of corporate governance, in particular, from the bona fide perspective;

(iii) it may generally be determined by other legal relations among the members of the legal entity, i.e. they may be unrelated to his/her activities.

In this respect, since liability in corporate relations deserves a dedicated study, we will limit our work to the possibility of seizure of the legal entity’s property for its member’s obligations which is not related to the operations of this legal entity. Therewith, we are to consider the above issues regarding the legal regime of property of different legal entities, i.e. owners and non-owners.

The key point that we may proceed from is the provision that “the owner is liable to the extent of all of his/her property”. Having become a debtor, the property owner must repay the debt, and provided he/she fails to do so, then there are enforcement mechanisms through which the debt will be recovered. In particular,

¹ The terms ‘municipal enterprise’ and ‘municipal foundation’ are frequently used in Ukrainian legislation and comes from soviet legislation. They identify corporations and foundations created by local authorities.

those include seizure of the debtor's property (para. 5 of Art. 48 of the Law of Ukraine 'On Enforcement Proceedings'), owned by him/her but may be held by other persons (Art. 53 of the same Law). In the latter case, it is necessary to prove that the property held by such other persons is indeed owned by the debtor.

Hence there arises the problem of whether or not the property transferred by the debtor, a member of a legal entity, under the ownership or any other real right should be considered the debtor's property. This problem becomes especially acute when it comes to a public legal entity founded by the state or a local community (Spasibo-Fateeva, 2017; Kucherenko, 2007; Posykaliuk, 2015).

4.2. The possibility of seizure of public companies' property

In the Ukrainian legislation the legal status of public companies¹ is regulated inconsistently and contradictorily. The status of *public* may refer to different companies:

i) So-called national joint-stock companies – NJSCs (NAK) that are fully owned by the state.

ii) other companies referred to in the

Commercial Code of Ukraine as “public-sector enterprises”, which include various business corporations, whose share in the share capital is at least 50% owned by the state;

iii) state and municipal enterprises, performing commercial activities, whose property is owned by the state or community, but economically managed by these enterprises;

iv) joint-stock companies whose shareholders are legal entities of public law of other countries (for instance, public joint-stock company Prominvestbank, whose major shareholder (over 99% shares) is public corporation of Russian Federation named Vnesheconombank, established by the the Russian Federation);

v) state enterprises engaged in commercial activities, whose property is owned by the state and assigned to these enterprises under the right of economic management.

For various types of public companies, the procedure of seizure of property for the obligations of their founders is significantly different, but still this process involves difficulties in identifying object and subject of ownership to their property. It is reasonable to provide a case illustrating the issue.

In Ukraine a joint-stock company, whose shares are state-owned, is referred to as a national joint-stock company (NJSC, or NAK). Its legal status is not regulated in the unified manner. According to the common rule, being a joint-stock company, these entities are owners, while their shareholder (the state) owns the shares. Therefore, the shares are sub-

¹ The concept of public company in Ukrainian legislation is very different from the concept of public company in the European one. If in European legislation (particularly, in British legislation), public company means a company who offers its shares to public through a stock exchange, in Ukraine public company is a joint stock company, whose controlling block of shares belongs to the state, or a state-owned or municipal enterprise whose property is owned by the state or local society and given to the company under the right of economic or operational management etc.

ject to seizure for the state obligations.

However, in Ukraine there are NJSCs that possess other property rights: a part of the property is owned by them, while the rest is in their economic or operational management, use or control. The controversy is not only in the fact that the same legal entity has property under different real rights, but also in the way it affects the seizure of the property. On the one hand, according to the Ukrainian laws, both the owner and the company having the right of economic management are liable with all their property, and therefore, the kind of right under which NAK holds its property doesn't have any legal impact on the seizure of NAK's property. However, on the other hand, legislation established considerable limitations of NAK's rights to its property and liability: (a) Art. 7 of the Law of Ukraine 'On Pipeline transport' prohibits alienating and encumbering real estate, main pipeline transport (fixed assets) and the NAK's shares etc.; (b) following para. 13 of the NAK's Charter (approved by the Resolution of the Cabinet of Ministers of Ukraine of 14 December 2016 No. 1044) NAK is not liable for its obligations with state-owned property, transferred to it for economic management, use of control.

Thus, the situation is not simple: the liability of average joint-stock companies, national joint-stock companies and even their particular types varies significantly and it is not always clear who and to what extent will be liable for the debts of these joint-stock companies: the JSC *per se* or its shareholder – the Ukrainian state.

This uncertainty also involves the liability of state-owned enterprises and their founder – the Ukrainian state, which is represented by a particular state body and its officials. For instance, once the Ukrainian state strongly objected to seizing aircraft An-124–100 "Ruslan", which was in possession of the state-owned enterprise Antonov Aeronautical Scientific-Technical Complex (Antonov ASTC). The aircraft was arrested by the sheriff of Canadian province Newfoundland for the enforcement by the Canadian authorities of the final decision of the Arbitration Institute of the Stockholm Chamber of Commerce of 30 May 2002 made in favour of the TMR Energy Ltd. in the dispute initiated by the latter against the State Property Fund of Ukraine.

In this case the Ukrainian party to the dispute (i.e., the State Property Fund of Ukraine) was arguing that a state enterprise possessing (under the right of economic management) but not owning state property is not obliged to forfeit that property for the debts of the state ("PACTA SUNT SERVANDA", 2003).

However, in 2018 in a similar dispute, where the number of Ukrainian companies as plaintiffs claimed for the seizure of the property of the Russian Federation to enforce the decision of the Hague Court of Arbitration (under case PTS No. 2015–36). According to the decision, the amount of 139 million US dollars and 20 million US dollars was seized from the Russian Federation represented by the Ministry of Justice as the compensation to the Ukrainian companies of their losses for the real estate,

expropriated in the Crimea after its unlawful annexation. The Ukrainian companies claimed that the decision of the Hague Court of Arbitrations could be enforced by the seizure of the shares of public joint-stock companies Prominvestbank and Sberbank of Russia, owned, respectively, by the public corporation Vnesheconombank and the RF Central Bank. The plaintiffs considered the shares as the property of Russian Federation, but not the property of particular Russian companies.

The problem, however, lies in the fact that according to the Law of the Russian Federation “On the Bank of Development” (adopted in 2007), Vnesheconombank is a state corporation and the owner of its property which may not be seized so as to recover the debts of the Russian Federation. Nevertheless, the Supreme Court of Ukraine delivered the judgment to seize the shares of these banks, though the grounds for this decision which come down to the conclusion that it is the Russian Federation who is the true owner of the shares, but not Vnesheconombank despite the provisions of its Charter, are disputable and unconvincing. In particular, para. 98 of the judgement is especially ambiguous: it merely indicates that while enforcing a court judgment it is merely required to identify that the property arrested and seized, according to the law of Ukraine is owned by the Russian Federation, but not by other foreign or Ukrainian persons (Resolution of the Supreme Court in case No. 796/165/18, 2019). Therefore, only one conclusion may be made: that the Supreme Court of Ukraine did not iden-

tify whether the Sberbank and VTB shares are in the RF ownership and whether they may be subject to seizure. In this way the Supreme Court in fact left the resolution of this issue to the state enforcement officer (Spasibo-Fateeva, 2019).

In this context it is reasonable to recall the approach of the European court, which decided that unitary enterprises and foundations do not have institutional independence from the state and act as their bodies, thus making the state itself liable for their activities (2007). The analysis of these cases testifies to the fact that the European Court of Human Rights solved the problem of holding the RF liable for the debts of state-owned enterprises / foundations.

Meanwhile it is still an open issue whether it is possible to apply this approach to holding a state corporation liable for the state debts (NJSC or a joint-stock company, where 100% shares are owned by the state), especially, if its charter includes the provision stating that the corporation itself is the owner.

Conclusions

The aforesaid shows that in Ukraine the legal regime of the legal entity’s property is highly varied, at times being insufficiently defined, at times – controversial and contradictory. Thus, it requires fundamental reviewing. We believe that the existing variety of organizational and legal forms and types of legal entities in Ukraine is unjustified. Many of these entities have no special legal status. In this respect, it appears that certain unification would be reasonable to allow certain legal entities, pro-

vided for in the Commercial Code of Ukraine, to be classified as business corporations, cooperatives, or foundations. This refers to private enterprises, which are in fact business corporations and, therefore, it would be logical to repeal the legislative provision determining their legal status, while obliging existing private enterprises to be reregistered in compliance with one of the types of business corporations. Before private enterprises are reregistered, it would be correct to consider them as limited liability companies in practice and thus to apply provisions on limited liability companies to them. It is necessary to cancel such rights as economic and operational management. Legal entities, having these property rights, must be recognized property owners. In case founders (members) of legal entities intend to set the limit to the execution of rights to some of the property which belongs to the legal entity, it may be stipulated in the

charters, while for some legal entities it may be specified by law (e.g., for joint-stock companies, whose shares are owned by the state).

The public companies need more detailed regulation and are to be provided a clear legal status. It is preferable to stipulate these issues in the Civil Code of Ukraine thus providing comprehensive regulation on all types of legal entities.

These reforms will also lead to the clarity as to the property liability of a legal entity, since if it is the owner of its property, then all this property may be subject to seizure. This way it will be possible to terminate disputes regarding the possibility of seizing the property of public enterprises for the state debts, as well as vice versa – when the claims are to hold the state liable as a founder of the enterprise, which transferred its property but not ownership to the enterprise.

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